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Nos. 514 and 530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PAN AMERICAN PETROLEUM CORPORATION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HUMBLE OIL & REFINING COMPANY ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY TO APPELLANTS' MOTION TO REVERSE.

LUTHER M. WALTER,
NUEL D. BELNAP,
JOHN S. BURCHMORE,
Solicitors for Appellees.

December 24, 1937.

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PAN AMERICAN PETROLEUM CORPORATION, APPELLEES

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

COLIN C. BELL AND WM. TRACY ALDEN, TRUSTEES OF THE ESTATE OF THE CELOTEX COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

GREAT SOUTHERN LUMBER COMPANY, BOGALUSA PAPER COMPANY, INCORPORATED, APPELLEES

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STANDARD OIL COMPANY OF LOUISIANA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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v.

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

MAGNOLIA PETROLEUM COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE TEXAS COMPANY (HOUSTON PLANT), APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

GULF REFINING COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE TEXAS COMPANY (PORT ARTHUR AND PORT NECHES PLANTS), APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

REPLY TO APPELLANTS' MOTION TO REVERSE.

Appellees above named respectfully urge the Court to deny the motion of appellants for summary reversal of the decrees entered by the district courts, for the following reasons:

1. The motion is wholly unsupported by law or precedent and in effect seeks a reversal by this Court of the solemn decrees of the statutory three-judge courts, in a manner inconsistent with and opposed to the laws of Congress and the rules of this Court.

2. Appellants withdrew their petition for reconsideration by the court below, presumably to expedite the full and final determination of the cases by this Court, and they ought not now to gain a summary reversal of the decrees below, on the same grounds.

3. The present cases are substantially different from the cases disposed of by this Court in its decision entered May 17, 1937, *United States* v. *American Sheet & Tin Plate Company*,[1] 301 U. S. 402, and that decision is not determinative of these cases.

4. The final decrees of the lower courts herein are correct; the underlying findings of fact and conclusions of law in each of these cases are correct and sound; and the grounds of error set forth in the appeals of appellants and in their statement of points to be relied on are not well taken. Therefore, the decrees of the courts below should not be reversed or the cases remanded.

[1] Hereinafter for brevity referred to as the Pittsburgh cases.

STATEMENT IN REPLY TO MOTION.

I.

The motion is unprecedented and contrary to law.

These cases are before this Court on appeal under Section 47 of Title 28 U. S. C. A., the appellants representing to the Court that they are aggrieved by the decisions of the court below, which, they contend, are erroneous. Having taken this appeal, they now ask this Court to depart from the usual and prescribed course for the conduct of cases on appeal and to grant the relief sought summarily, "without awaiting briefs and oral arguments," on the sole authority of a cited case, which, they urge, is controlling. As a precedent for this novel request, they cite *Williamsport Company* v. *United States*, 277 U. S. 551.

In that case such a motion to reverse was indeed presented by the appellants and to that extent a precedent for the present motion may be found. But the case has no bearing on the question of the propriety of such a motion since the Court did not pass on the matter but assigned the case for oral argument, observing in passing that the motion had been presented "presumably in analogy to motions to affirm under Rule 6".

As to the present motion, there can be no real analogy to Rule 6, which provides for motions to affirm predicated either on the ground that it is manifest that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The grounds urged by appellants in support of their mo-

tion to reverse these cases bear no resemblance to such grounds but are rather the grounds for the very appeal itself.

Likewise the course suggested by appellants is not justified by the action taken in *Goodman Lumber Company* v. *United States,* and *A. O. Smith Corporation* v. *United States,* Nos. 855 and 856, October Term, 1936, 301 U. S. 669, because in those cases the Court *affirmed* the decrees of the three-judge court below. In this case the courts below have entered findings of fact and conclusions of law, which the appellants attack as erroneous. To upset that decision without that full consideration of all the questions involved in the appeal which is necessary to a mature judgment would be to deny appellees the benefit of regular process of law and to fail to give proper respect to the decisions of the specially constituted courts. Moreover, if the Court should undertake to determine with finality whether the facts in these cases are substantially similar to the facts in the *Pittsburgh cases* and the further question whether there is substantial evidence to support the Commission's present decisions, it would have to examine a considerable record, which has not yet been printed.[3] If counsel for appellees should attempt anything like a full discussion of these questions, it would be necessary to argue the whole case on the merits in support of the findings and decrees entered below. We submit that this reply does not afford a fair opportunity so to defend the courts below.

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[3] The record which is to be printed herein, by stipulation of the parties, covers for the most part narrative testimony, exhibits and documents which did not form part of the printed record before this court in the Pittsburgh cases.

II.

Withdrawal by appellants of motions for rehearing below.

In paragraph number 3 on page 5, appellants make a point of the circumstances under which these appeals were taken and mention the fact that on May 26, 1937, "government counsel filed motions with the courts below to dissolve the final decrees and to rehear and to reconsider these cases, in view of the decision by this court" in the *Pittsburgh cases*. That was more than a month prior to expiration of the appeal period. The further fact is that after counsel for appellees had filed reply to that motion,[2] the appellants under date of June 18, 1937, presented their further motion for leave to withdraw their motion for rehearing, on the following grounds:

> "As grounds for said motion defendant and intervening defendant state that they are forthwith taking an appeal from the final decrees in these cases entered on April 28, 1937, and, under these circumstances, believe that a more prompt disposition of the causes by the Supreme Court of the United States will result by the granting of the petition to withdraw the motion for rehearing and reconsideration."

Counsel for appellees consented to such withdrawal on the ground stated, and without any information either from government counsel or from the Court that, as appellants now state, they "were informed by the presiding judge that it would be impossible to as-

[2] Neither the motion filed with the lower courts to dissolve the final decrees and reconsider the cases nor the reply of appellees thereto are in the record transmitted to this Court, by virtue of the stipulations of the parties in regard to the record.

semble the three-judge court," prior to expiration of the appeal period. The withdrawal request was granted.

The present motion amounts to an attempt by appellants to reinstate in this Court the motion which properly should have been left in the first instance for decision by the three judges who had intimate knowledge of the facts and of the record and who had already given thorough consideration to the cases after hearing oral argument and receiving briefs. Appellants should not have withdrawn the motion for rehearing, if they wanted a summary ruling. Had appellees been given any reason to suppose that the motion would be reinstated at this stage of the appeal, consent to its withdrawal would not have been given, and the lower courts might have passed on the motions. Presumably appellants would have proceeded with timely appeal and could then have assigned error against the denial of their motion; and in such event this Court would then have had the affirmative assurance in each case that the three learned judges below regarded the decision in the *Pittsburgh cases* as not of controlling force herein. In any event the failure of the three-judge courts to act upon the petition before the date when appeal had to be taken could not have prejudiced that right of appeal. Plainly the real reason for withdrawing the motion was the knowledge on the part of government counsel that the *Pittsburgh cases* really are wholly dissimilar to these cases as to underlying facts and that there is nothing in the conclusions of law of the court below that is not in harmony with the opinion of this Court.

III.

These cases are not substantially similar to the Pittsburgh cases.

The substance of appellants' motion lies in the assertion that the questions presented in these cases were decided in *United States* v. *American Sheet & Tin Plate Company, supra,* and that therefore the decrees of the courts below must be reversed.

Appellees emphatically deny that this is true. The underlying facts and circumstances here are so wholly unlike those with which the Commission and the courts dealt in the *Pittsburgh cases* that they demand wholly different results.

In view of the fact that a reply to this motion hardly affords a fair opportunity to support the courts below, it should suffice to point out some of the more vital differences in the situations with which the Commission was dealing, and a few pointed reasons why the opinion in the *Pittsburgh cases* requires a different conclusion here.

It should be noted at the outset that the *Pittsburgh cases* involved five steel plants and two glass industries in the north. The present cases involve seven oil refineries, a sawmill and a plant manufacturing building board, all situated in Louisiana and Texas. Granting the correctness of the decision of this Court as to the sufficiency of the findings and the adequacy of the evidence to support those findings respecting the steel and glass plants involved in the earlier cases, it does not follow that the evidence before the Commission is adequate to support the necessary findings as to the refineries, sawmill and board plant involved in the present cases.

As this Court said in its opinion, "the Commission properly held that each case must be decided on the circumstances disclosed."

Appellants apparently recognize that the *Pittsburgh cases* cannot control herein and on page 8 of the statement in support of the motion they refer the Court to certain portions of the transcript of record in No. 514 with the statement that it can be readily ascertained therefrom "that there is ample evidence of record to support the orders."

We not only object to this method of disposing of a substantial question upon which hinges the validity of the Commission's order but we also emphatically disagree that the record made as to the industries here involved lends any support to the Commission's order.

Illustrative of the vital differences between these cases and the *Pittsburgh cases,* and of the total failure of the record here to justify the action taken by the Commission, is the holding of this Court in the *Pittsburgh cases* that the record failed to establish any custom on the part of the carriers to do the spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The Commission there had found and this Court stated in its opinion that the practice of the northern carriers at iron and steel plants had not been uniform and that there had been substantial differences in the treatment of individual steel plants, as regards terminal deliveries and allowances. The record before the Commission and in the courts below shows that this is not true of the southern carriers, and it is not true as to either petroleum refineries or sawmills.

On the contrary, the record contains comprehensive

testimony concerning some thirty petroleum refineries, of varying sizes, and discloses not one instance where the carriers do not place the cars (or bear the cost of placement) at the loading racks or other locations desired by the shipper within refineries and oil terminals. On this record there can be no question that, by custom and general practice, the freight rates cover receipt and delivery by the carriers at loading and unloading racks on private side tracks *at refineries*.

This Court also noted with approval the finding of the Commission in each case that the spotting service at those industries involved an "excessive service greater than that involved in team track spotting." Contrasted with this is the situation at these refineries, where the traffic is predominantly in tank cars; and the allowances received by these appellees are in large part on tank cars of petroleum products. The tariffs naming the freight rates heretofore prescribed by the Commission on petroleum products definitely *forbid* delivery of such products on public team tracks.[4]

Unlike the iron and steel traffic, therefore, there can be no question as to whether a refinery is receiving more than the equivalent of public team track service. And the orders of the Commission have the striking effect of making it unlawful to give any kind of delivery of tank carloads of petroleum at these particular refineries.

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[4] The *Consolidated Freight Classification*, which governs the railroads throughout the country, provides a general rule that the principal petroleum products (excepting asphalt), when moving in tank cars

> "must not be shipped and will not be delivered unless consigned to parties accepting delivery on private sidings equipped with facilities for piping the liquid from tank cars to permanent storage tanks, or consigned to parties accepting delivery from railroad sidings where facilities exist for piping liquid from tank cars to permanent storage tanks."

The Great Southern Lumber Company, plaintiff in No. 317 below, operates an ordinary sawmill. The propriety of allowances to sawmills for switching cars of lumber to the trunk lines was expressly approved by this Court in the *Tap Line Cases,* 232 U. S. 1. Subsequently, in prescribing the lumber rates from southern pine territory, and approving allowances to sawmills, the Commission itself has ruled that the lumber rates properly apply, through the medium of allowances, from loading points at sawmills, "when a mill has a physical connection with a trunk line and is not more than 3 miles distant." *The Tap Line Case,* 23 I. C. C. 277, 293.

In sustaining the Commission's orders in the *Pittsburgh cases,* the Court further said (parenthesis ours):

> "If the findings were limited to the practices specified in the sections mentioned the position of the appellees (that the *findings* were fatally defective) would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates."

It is plain from the foregoing references to the record that, as to the sawmill and refineries here involved there is not only no evidence whatsoever to support such findings, but to so find, as the Commission has, is directly contrary to all the evidence.

We respectfully submit, therefore, that the appellants' motion to reverse on the authority of the *Pittsburgh cases* is equivalent to suggesting that the same conclusion must be reached in each case, regardless of the actual circumstances disclosed.

IV.

The District Courts correctly decided these cases.

It is a rule of law so well established as hardly to justify the citing of cases that the federal courts have neither the power nor duty of substituting their judgment for that of the Commission in a suit attacking an order of that body. The plaintiffs below did not ask the courts so to do and have no intention of so doing in this court. It is equally well established law that an administrative tribunal may not act capriciously, but that its orders must be within the authority conferred upon it by Congress and must be based upon findings of fact supported by substantial evidence. In the case of the Interstate Commerce Commission at least, this principal has been infrequently invoked. For it has been the practice of that body for many years to confine itself voluntarily well within the ambit of its authority and to act under that authority only after the most full and fair hearing of all parties, however remotely interested. Thus it has come to be a popular faith that any act of the Commission must have been based on thorough knowledge of the facts and circumstances and mature consideration of their significance in the field of transportation. To the experienced practitioner it comes as a distinct shock, therefore, that the Commission should permit orders to be entered in its name and with its approval, which, so far from being supported by findings based on all the circumstances disclosed, are indeed based on findings only of vague improprieties not definitely identifiable with any prohibition in the Interstate Commerce Act. When it is seen further that these findings are not even sup-

ported by evidence, that they actually fly in the face of facts (as for instance the finding that interchange tracks, distant from all loading and unloading facilities at a refinery, are reasonably accessible points for receipt and delivery of tank carloads of petroleum products) then indeed is one constrained to say this is administration run riot.

Unhappily, such are the cases which are now before this Court. The statutory courts studied the cases diligently and so found. We earnestly urge this Court to deny this motion of appellants, receive briefs, examine the record, and affirm those decrees entered by the courts below.

LUTHER M. WALTER,
NUEL D. BELNAP,
JOHN S. BURCHMORE,
Solicitors for Appellees.

December 24, 1937.